In the High Court of Judicature at Madras

Dated: 17/11/2003

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The Hon'ble Mr. Justice R. Jayasimha Babu
and
The Hon'ble Mr. Justice S.R. Singharavelu

Tax Case No. 72 of 2000

M/s. Carborandum Universal Ltd.
Chennai. ... Applicant

-Vs-

The Commissioner of
Income-tax,
Chennai. ... Respondent

Tax case under Section 256 (1) of the Income Tax Act, 1961 against the order made in I.T.A. No: 3119/Mds/90 dated 29.05.1988 for the assessment year 1987-88.

!For applicant : Mr.P.P.S.Janardhanaraja for
M/s. Subbaraya Aiyer

^For respondent : Mr. K. Subramaniam,
Senior Standing counsel for
Income tax

:O R D E R

(Order of the Court was
made by R. Jayasimha Babu, J.)

The reference is at the instance of the assessee. The assessment year is 1987-88.

2. The first question is concerned with the interpretation of Section 32 AB and as to whether it has been construed too narrowly by the Tribunal.

3. The Tribunal has held that the exclusion of the amount of interest on securities, dividends and rents while making the computation under Section 32 AB of the Act was in accordance with Section 32 AB even though all those amounts form part of the computation that was required to be made in terms of Parts II and III of the VIth Schedule to the Companies Act for arriving at the

profits from the assessee's business.
4. Sectin 32 AB which deals with investment deposit account in sub-section 1 provides that,
" Subject to the other provisions of this Section, where an assessee, whose total income includes income chargeable to tax under the head "Profits and gains of business or profession", has, out of such income,-
.....
.....
.... shall be allowed a deduction [such deduction being allowed before the loss, if any, brought forward from earlier years is set off under section 72] of --
(i) a sum equal to the amount, or the aggregate of the amounts, so deposited and any amount so utilised; or
(ii) a sum equal to twenty per cent of the profits of business or profession as computed in the accounts of the assessee audited in accordance with sub-section (5),
whichever is less : "

5. Sub-section (3) of Section 32 AB sets out the manner in which the profits of eligible business or profession of an assessee for the purposes of sub-section (1) is to be calculated. It provides,

" (3) The profits of eligible business or profession of an assessee for the purposes of sub-section (1) shall, --

(a) in a case where separate accounts in respect of such eligible business or profession are maintained, be an amount arrived at after deducting an amount equal to the depreciation computed in accordance with the provisions of sub-section (1) of section 32 from the amounts of profits computed in accordance with the requirements of Parts II and III of the Sixth Schedule to the Companies Act, 1956 (1 of 1956), as increased by the aggregate of --

(i) the amount of depreciation ;
(ii) the amount of income-tax paid or payable, and provision therefor ;
(iii) the amount of surtax paid or payable under the Companies (Profits) Surtax Act,1964 (7 of 1964) ;
(iv) the amounts carried to any reserves, by whatever name called ;
(v) the amount or amounts set aside to provision for losses of subsidiary companies; and

(vi) the amount by way of provision for losses of subsidiary companies ; and
(vii) the amount or amounts of dividends paid or proposed,

if any debited to the profit and loss account ; and as reduced by any amount or amounts withdrawn from reserves and provisions, if such amounts are credited to the profit and loss account. "

6. Thus, the calculations required to be made for the purpose of the section is to commence with the figure representing the profits of the eligible business as computed in accordance with the requirements of Parts II and III of the VIth Schedule to the Companies Act. From that figure the amount equal to the depreciation computed in accordance with Section 32 (1) of the Income Tax Act is to be deducted. After such deduction, that amount is to be increased by the aggregate of the amounts set out in (i) to (vii) of Section 32 (3). A sum equal to 20% of that amount is to be allowed as a deduction under Section 3 2 AB (1) (ii).

7. The determination of the profit required to be made in accordance with Parts II and III of the VIth Schedule to the Companies Act is required to be made after taking into account all the activities of the assessee governed by the Companies Act, as the Profit and Loss account required to be drawn up by a company must necessarily reflect all the income and all the expenditure incurred by the Company in that year.

8. Part II of Schedule VI to the Companies Act is titled " Requirement as to Profit and Loss Account". Paragraph 2 thereunder mandates that the profit and loss account "shall be so made out as clearly to disclose the result of the working of the Company during the period covered by the account". Paragraph 3 requires that

"The profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under the most convenient heads; and in particular, shall disclose the following information in respect of the period covered by the account:
....."
inter alia, as set out in clause 3 (xi)

" 3 (xi)
(a) The amount of income from investments, distinguishing between trade investments and other investments.
(b) Other income by way of interest, specifying the nature of the income.
(c) The amount of income-tax deducted if the gross income is stated under sub-paragraphs (a) and (b) above. "

The income by way of interest as also income from investment, which would include dividend, are clearly amounts which are required to be taken note of while making the calculations required to be made for the purpose of Parts II and III of the VIth Schedule to the Companies Act. Income from rent, though not specifically referred to, being part of the total income of the company, must necessarily be accounted for in the profit and loss account required to

be drawn up in accordance with Parts II and III of the VIth Schedule to the Companies Act.

9. Section 32 AB does not require the profit for the purpose of Section 32 AB (1) be calculated in accordance with the provisions of the Income Tax Act. All that it provides is that the calculations should first be made in accordance with the Companies Act and the requirements more specifically required of Parts II and III of the VIth Schedule to the Companies Act.

10. There is, therefore, no scope at all for importing the concept of different heads of income found in the Income Tax Act, into the calculation of profit required to be made in terms of Section 32 (3) of the Act which makes the calculations made in accordance with the Companies Act, the starting point for making the deductions and additions provided for in Section 32 (3) after which the sum of 20% referred to in Section 32 AB (1) is to be ascertained.

11. The assessing officer has excluded the amount of dividend received as also the income by way of interest and rents by relying on the fact that those incomes are to be taxed under the Act as income from other sources. By doing so, he has failed to give effect to the plain language and the mandate of Section 32 AB (3).

12. Learned counsel for the revenue however sought to sustain the order of the Tribunal which has upheld the assessment made by the assessing officer by relying on the decision of the High Court at Gauhati in the case of Commissioner of Income-tax vs. Dinjoye Tea Estate (P) Ltd. 224 (1997) I.T.R. 263 which decision was followed by the Calcutta High Court in the case of Commissioner of Income-tax vs. Warren Tea Ltd. reported in 251 (2001) I.T.R. 382.

13. Having perused both the judgments, with great respect, we are unable to subscribe to the views expressed therein. In the Gauhati case at page 266, the argument that the assessee's counsel had advanced with regard to Section 32 AB, though set out, was not considered on the ground that the question referred to the Court didn't permit such consideration. In the Calcutta case, the Court noticed the fact that the Tribunal had held in favour of the assessee by holding that Section 32 AB (3) requires the calculations to be made in accordance with the VIth Schedule to the Companies Act and, therefore, the dividend received by the assessee is to be taken into account while determining the profit, but did not consider the correctness or otherwise of that view as it proceeded to hold that the decision of the Gauhati High Court covered the case before them.

14. Having regard to the content of Section 32 AB (3) and the scheme of the whole section, it is clear that it is the computation made in terms of Schedule VI of the Companies Act that has to be the starting point, and all the things included in that computation are required to be taken note of and not to be disregarded except to the extent specifically provided for in

Section 32 AB (3).

15. The first question referred to us is, therefore, answered in favour of the assessee and against the revenue.

16. The second question is as to whether the Tribunal was right in sustaining the action of the assessing officer in charging interest under Section 216 of the Income Tax Act.

17. The assessee made payments of advance tax on the 15th June 1986 , 30th September 1985 and 15th December 1986 in the sums of Rs.32,40,000/-, Rs.32,40,000/- and Rs.65,62,000/- respectively. The income that it had estimated while paying the first two installments of advance tax was Rs.1,98,00,000/-. The estimation of income when it paid the third installment was Rs.2,65,60,000/-.

18. The assessee had explained the reasons for this varying estimates by stating that in the accounts for the year ended 31st August 198 6 it had been decided to write off interest capitalised and that while filing the advance tax estimates in June as also in September of 19 86, the amount of interest to be capitalised and written off was estimated at a figure of Rs.70,00,000/-. However, after the accounts for the year ending 31st August 1986 was finalised, it was found that the interest charged, to be capitalised and written off was only Rs.26 ,00,000/- and the income therefore, had to be revised upwards by Rs.4 4,00,000/-. The other reason given was that during the finalisation of accounts provisions made for various expenditures were reviewed and excess provision to the extent of Rs.25,43,000/- in the books was added back to the profit and loss account which resulted in an increase of income by that amount. The assessee's submission was that these figures could not be estimated accurately while filing the estimations for the first and second instalments and while paying the advance tax.
19. The Tribunal has upheld the levy of interest under Section 216 of the Income Tax Act by observing that as the previous year of the assessee had ended on 31st August, 1985 the assessee had sufficient time to review the excess provision and make a proper estimation. Neither the Tribunal nor the authorities had found the explanation offered by the assessee to be a false one. Advance tax was to be paid on the basis of estimates. An estimate is, what the word itself conveys, only a prediction in the view of the person making it, as his likely income. It is an attempt to predict the future on the basis of information presently available. It is at best an intelligent guess. It is not a prediction which can be made with accuracy.

20. The estimate in this case was made by the assessee on the basis of the data which it had at the time it made the estimation while paying the first and second installments of the advance tax. The subsequent revision of the figures after other relevant data had become available to the assessee at a later point of time would not by itself render the assessee liable for payment of interest. That is the reason why the section vests discretion in the assessing officer who is empowered either to levy interest or not to levy interest. On the facts of this case the reasons given by the assessee not having been found to be false and the assessee having revised its estimation

before it paid the third instalment and the assessee having paid the full amount on the basis of such re-estimation, the assessing officer was required to apply his mind as to whether at all the levy of interest was warranted.

21. As the assessing officer has not taken note of all the factors that he was required to, we direct the assessing officer to examine the question of levy of interest under Section 216 of the Income Tax Act afresh and for this purpose we set aside the orders of the Tribunal and the other authorities on this aspect.

Index : Yes
Website : Yes

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To,

1. The Assistant Registrar,
Income Tax Appellate Tribunal,
"Rajaji Bhavan" III Floor,
Besant Nagar,
Madras - 90.

2. The Secretary,
Central Board of Revenue,
New Delhi.

3. The Commissioner of
Income-tax,
Central II,
Madras

4. The Commissioner
of Income-tax (Appeals) II,
Madras.

5. The Deputy Commissioner
of Income-tax,
Central Circle II (7),
Madras.